



City of Rochester

APPENDIX H
MONROE COUNTY PUBLIC
DEFENDER'S OFFICE,
EXECUTIVE ORDER 203
REPORT, MARCH 1, 2021



Monroe County Public Defender's Office
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INTRODUCTION

The Monroe County Public Defender’s Office (“MCPD”) was created in 1968 and has fought for justice and equity for our clients for 52 years. Public defenders have represented clients in all of the village and town courts in Monroe County, as well as in Rochester City Court and the Superior Courts. Each year we represent, on average, over 15,000 persons who are accused of committing a crime in Monroe County. Through that representation, we have become familiar with policies, practices, leadership, and officers in each police department throughout the county.

In June of 2020, Governor Cuomo issued an executive order requiring each police department to analyze its policies with an eye toward reform. According to the executive order, police departments have been charged with seeking input from relevant stakeholders.¹

The Monroe County Public Defender’s Office is one such stakeholder.

The following police agencies practice within Monroe County: Brighton Police Department, Brockport Police Department, East Rochester Police Department, Fairport Police Department, Gates Police Department, Greece Police Department, Irondequoit Police Department, Monroe County Sheriff’s Office, New York State Police, Ogden Police Department, Rochester Police Department, and Webster Police Department. The Rochester Police Department is the largest police department in Monroe County.

In preparing to respond to the Governor’s mandate, the staff of the Public Defender’s Office considered the many procedures, practices, and other aspects of policing of the numerous departments in an effort to decide how we might best impact and contribute to the review of police practices. The following sections examine some of the most troubling practices of police departments and their personnel in Monroe County and the City of Rochester. As it is the largest police agency in Monroe County, this Report will concentrate on the Rochester Police Department. However, the recommendations made herein are applicable to all police agencies that operate in Monroe County.

¹ “The political subdivision, in coordination with its police agency, must consult with stakeholders, including but not limited to membership and leadership of the local police force; members of the community, with emphasis in areas with high numbers of police and community interactions; interested non-profit and faith-based community groups; the local office of the district attorney; **the local public defender**; and local elected officials ...”

(Executive Order No. 203: New York State Police Reform and Reinvention Collaborative, emphasis added.)

Despite the clear terms of this order, several police agencies in Monroe County failed to seek input from the Monroe County Public Defender’s Office, including the Brighton Police Department, Brockport Police Department, East Rochester Police Department, Fairport Police Department, Gates Police Department, Irondequoit Police Department, and Webster Police Department.

The Rochester Police Department has a long history of policies and practices that often result in excessive use of force, unconstitutional practices, and racism. In 1975, the death of a Black woman at the hands of Rochester Police Department officers led to the creation of the Citizens Committee on Police Affairs, dubbed the Crimi Committee (after its chairman and local lawyer Charles Crimi). That committee recommended many changes to the Rochester Police Department but achieved few results.² There have been many accusations of excessive use of force by RPD officers over the years, among them the 2018 assault and cover-up of the assault on Christopher Pate, the 2020 killing and cover-up of the killing of Daniel Prude, and the January 2021 brutal cuffing and pepper-spraying of a nine-year-old girl. There have been many more instances of excessive force that went unreported in the local media. In spite of community protests, and local and national outrage, the incidents continue.

A comprehensive report on necessary reforms to change the Rochester Police Department would encompass reviewing decades of officer misconduct, as well as reviewing numerous policies and practices that have been implemented over the last several decades. As we cannot sufficiently address all of those issues with the time and resources we have available, we have chosen to focus on several areas in which we believe changes in policies and procedures can effect meaningful change.³

PRETEXT STOPS: ONE COMMUNITY, TWO SYSTEMS OF POLICING

Monroe County residents are fortunate to have a number of bike paths, including the picturesque Canal Path along the Erie Canal, the wooded paths along railroad beds (“rails to trails”), and even some marked lanes on many streets. Many residents of the county freely enjoy riding their bicycles without any interference from police officers. But not all.

Rochester Police officers frequently stop a significant segment of our community because they do not have bells on their bicycles.⁴ These police stops are not precipitated by accidents caused by the failure to use a required bell. Nor are they initiated due to other dangerous conditions. Bicycle operators without a bell on their bicycle are stopped because that is a tactic

² (See Rochester City Newspaper, 9/3/2020, “Fifty years of Rochester police reform yielded few returns,” by Gino Fanelli.)

³ A more extensive list of topics which should be examined and incorporated into reforms would include:

1. educational requirements for officers;
2. residency requirements for officers;
3. psychological assessment for prospective officers;
4. a policy requiring that any officer observing misconduct by other officers be required to report it;
5. an effective disciplinary process that seeks to find the truth and appropriately discipline officers, instead of concealing it and allowing those who violate rules or laws to remain employed;
6. a civilian review board that has the authority to review allegations of misconduct and impose discipline, as well as develop mandatory policies and procedures for the department; and
7. transparency of allegations and dispositions of disciplinary proceedings; and an in-depth revision of the police contract.

⁴ This is a violation of Vehicle and Traffic Law § 1236: “[n]o person shall operate a bicycle unless it is equipped with a bell or other device capable of giving a signal audible for a distance of at least one hundred feet, except that a bicycle shall not be equipped with nor shall any person use upon a bicycle any siren or whistle.” (New York V&T 1236[b].)

used by the Rochester Police Department to interfere with their movement, and to try to use the stop to leverage a search of the operator. Most, if not all, of these stops are of young Black men and boys.

While white men, women, and children ride bicycles without bells with impunity throughout Monroe County, Black men, women and children in the City of Rochester are subjected to a “police state” in which many of their movements are monitored, tracked, and interrupted.

In the Park Avenue area or South Wedge area of Rochester, pedestrians sometimes walk in the street when sidewalks are congested or they are trying to reach a destination more directly. Similarly, persons who engage in fitness running sometimes run on the street, instead of on the sidewalk.⁵ They are never ticketed for such misconduct. Yet, routinely, Black and brown members of our community are stopped for violating a Vehicle and Traffic law that prohibits walking in the street when the sidewalk is available.

The use of such pretexts to regularly interfere with the movement of members of our community is devastating to the morale of those stopped, their neighbors, friends, family, and the rest of the community who care about the fair application of the law. It promotes the concept that we have two classes of citizens, and two systems of justice—one for People of Color and one for white society. It fuels anger and resentment at over-policing. It reinforces the notion that the Rochester Police Department chooses its targets based on race and poverty.

A “pretext stop” is the stop or detention by law enforcement officers who wish to detain individuals for unlawful reasons but use a lawful, if transparently secondary, excuse for the detention. Frequently, the excuse is a traffic violation. These actions by police are too often directed against members of communities of color. For example, as noted above, in Rochester, New York, individuals are often stopped because they have no bell on their bicycle, or because they are walking in the street when the sidewalk is available, both violations of the Vehicle and Traffic laws. In the experience of the attorneys of the Monroe County Public Defender’s Office, these individuals are always, or nearly always, People of Color. In the experience and memory of MCPD staff, there have been no such stops or detentions of white members of our community represented by the MCPD Office.

Under the United States Supreme Court’s interpretation of the U.S. Constitution, a pretext stop is permissible.⁶ The New York Court of Appeals has found that a pretext stop does not violate the New York State Constitution, stating:

We hold that where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate article I, § 12 of the New York State Constitution. In making that determination of probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant.

⁵ Vehicle and Traffic Law § 1156 states: “(w)here sidewalks are provided and they may be used with safety it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway.” (V&T § 1156[a].)

⁶ *Whren v. U.S.*, 517 U.S. 806 (1996).

People v. Robinson, 97 NY2d 341, 349 (2001).

As a result of the lawfulness of pretext stops and the practices of the Rochester Police Department, our community is divided into two classes of citizens—one, largely or entirely composed of People of Color, who are frequently stopped and detained for minor Vehicle and Traffic offenses such as riding a bicycle without a bell or walking in the street, and a second group, largely or completely composed of white members of the community, who violate these laws routinely and with impunity. The biased use of pretext stops devastates the lives of those who are frequently stopped and destroys police/community relationships in communities of color.

While such stops are lawful, they are corrosive and toxic to our community. They fuel anger against police officers who refuse to allow young people and adults of color to ride bicycles or walk in their neighborhoods in ways that white people can in the predominantly white city neighborhoods of the South Wedge and Park Avenue areas, or in the suburbs of Monroe County. Should People of Color live in or venture into predominantly white neighborhoods, they are far more likely to be stopped than their white counterparts.

If the Rochester Police Department, a department that has been known for a history of officers engaging in such racist conduct as issuing a vocabulary of “ghetto lingo”⁷ and creating clothing under the “Crime Dawgs” name, is sincere about reform, it must enact policies that prohibit pretext stops. It must stop interfering with the movement of Black and brown people who are merely observed walking or riding bicycles. It must stop dividing our community along racial and economic lines. In a time when minor traffic and vehicle stops across the country have led to the deaths of countless People of Color, and at a time when the Rochester Police Department is under scrutiny for its own actions and efforts to conceal them, it is imperative that the Rochester Police Department reduce the needless, aggressive, and intimidating tactic of pretext stops.

In an effort to gather data for a study of pretext stops, an MCPD staff member recently attempted to FOIL documents from the Rochester Police Department reflecting the demographics of those stopped, or at least documents relating to such stops, and was initially informed they did not exist. After appealing the claim that there were no such records, the attorney was given a summary of stops for 2020 (as a result of the pandemic there were likely fewer people as pedestrians or operating bicycles). Once the summary was provided, the attorney requested the original records. According to the limited data received, the overwhelming majority of tickets issued for no lights (or bells) on bikes, failure to use the sidewalk, and inadequate turn signal were issued in majority minority areas of the City of Rochester. Where the race of the ticketed person was provided, over 90% of recipients were Black.

The refusal to admit the existence of the records, and the ongoing dispute over what should be provided, suggest an intent to hide the statistics and information relating to the use of pretext stops to detain largely Black and brown persons in our community. Any effort to reform the policies and practices of the Rochester Police Department must include the free sharing of information which, in any case, courts have ruled citizens have a right to.

⁷ <https://www.mpnnow.com/article/20081106/NEWS/311069912>.

Recommendations

As noted above, although pretext stops are not violative of the constitution, their use significantly harms our community. While the Rochester Police Department cannot change constitutional law, it can voluntarily formulate policies that end these discriminatory practices. We urge all police departments in Monroe County to take the following steps: (1) keep demographic information on the race and ethnicity of those stopped for all V&T and violation-level offenses, and include the names of officers who engage in such stops; (2) make such demographic information available to the public; (3) prohibit pretext stops by police departments in their policies and procedures; and (4) ensure that police body-worn cameras are turned on and a reason is stated by the officer prior to any stop for the following specified Vehicle and Traffic Law offenses, as well as disorderly conduct charges: no bell on bike (Vehicle and Traffic Law § 1236); walking in street when sidewalk available (Vehicle and Traffic Law § 1156); failure to signal turn 100 feet in advance of turn (Vehicle and Traffic Law § 1163); and excessive tint (Vehicle and Traffic Law § 375[12-a]).

ROCHESTER POLICE DEPARTMENT RESPONSES TO PROTESTS

In 2014, the United States Supreme Court described the importance of public spaces as venues for the expression of political opinions:

“[P]ublic way[s]” and “sidewalk[s]” . . . occupy a “special position in terms of First Amendment protection” because of their historic role as sites for discussion and debate...These places—which we have labeled “traditional public fora”—“have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” . . . It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,” this aspect of traditional public fora is a virtue, not a vice.

McCullem v. Coakley, 573 U.S. 464 (2014)

During the past year, communities across the country have experienced protests by people challenging racial injustice. In the greater Rochester area, most demonstrations occurred within the City of Rochester. These large demonstrations made clear that there is a great need for training, education, and leadership during demonstrations. While there was a small minority of demonstrators who engaged in property damage and other unlawful behavior, the vast majority of peaceful protestors, fighting for racial equity and exercising their treasured and protected First Amendment rights, did not. Yet many demonstrators faced unprovoked force and aggression from members of the Rochester Police Department. At times officers failed to abide by the letter and

spirit of the law in refusing to inform persons arrested during the protests of their charges and detaining them for overly lengthy periods.

The types of conduct and responses by RPD to peaceful demonstrators, documented by media and other sources, include:

- (a) Use of tear gas on civilians, including the elderly and children;
- (b) Use of tear gas and pepperballs on peaceful protesters, including the elderly and children, without any effort to first peacefully clear the area;
- (c) Insufficient warning to clear areas before use of force deployed;
- (d) Lack of clear instructions to protesters as to where to proceed in order to obey orders;
- (e) Firing pepperballs and tear gas canisters at people, instead of at the ground, injuring many;
- (f) Specifically targeting peaceful protesters with pepperballs, possibly rubber bullets and tear gas canisters;
- (g) Specifically targeting clearly identified journalists by shooting pepperballs and tear gas at them (in at least one instance, telling a journalist that he, as a member of the press, was not immune from police force, just prior to shooting him in the back with a pepperball or other item);
- (h) “Kettling” protesters on a bridge with low walls, which could easily have become a tragedy involving deaths;
- (i) Shooting pepperballs at fleeing protesters while they were dispersing in accordance with orders;
- (j) Moving protesters forcefully into residential neighborhoods;
- (k) Destroying property of protesters intended for medical use, such as water and milk to remedy tear gas and other injuries and irritations;
- (l) Chasing protesters into a church and then firing at the church;
- (m) Hiding badges and any identifying information to avoid accountability and transparency;
- (n) Upon arrest, detaining protesters for additional time on charges that only warrant issuance of appearance tickets;

(o) Refusing to accept a passport as ID and refusing to accept ID from protesters and requiring they have others bring additional ID to the station⁸;

(p) Requiring ID when identification could have been determined through questioning and a review of police records (see CPL § 150.20); and

(q) Overcharging Unlawful Assembly.⁹

There are many treatises that address how to respond to peaceful demonstrations by protestors.¹⁰ The actions by Rochester Police Department personnel not only exacerbated tensions between police and civilians, but violated all sensible recommendations for police responses to peaceful protests. The use of “kettling” of protestors, excessive force, targeting of press and other conduct of the Rochester Police Department mirrored much of the conduct of the New York Police Department during protests in the Bronx.¹¹

The methods used to interrupt, contain, and end demonstrations in Rochester have cost local police forces upwards of \$1.4 million in overtime alone¹² and, rather than quelling the community response, have created even deeper divisions. This does not even account for the costs the City will be facing once inevitable lawsuits are filed by those who were the subjects of unlawful or excessive force.

Beyond the practical and financial consequences of the Rochester Police Department’s responses to the protests, there are human and community costs. These effects are not measurable in dollars.

RECOMMENDATIONS REGARDING EXCESSIVE USE OF FORCE

As noted in the introduction, the Rochester Police Department has a long history involving allegations of excessive use of force by a notable percentage of its officers. Most recently, the entire community, and the entire country, were able to witness the slow death of Daniel Prude and the brutal cuffing and pepper-spraying of a nine-year-old girl. In order to begin to assess and respond to claims of excessive use of force, we make the following recommendations:

A. *Provide a clear indication whenever an individual is being placed under arrest.*

⁸ See CPL § 150.20.

⁹ See, generally, <https://www.democratandchronicle.com/story/news/2020/09/24/rochester-police-fired-thousands-pepper-balls-daniel-prude-protesters/3503589001/>; <https://nypost.com/2020/09/24/rochester-pd-spent-1-4m-in-ot-on-daniel-prude-blm-protests/>.

¹⁰ Some practices, including the prohibition of the use of asphyxiating agents, are addressed in the Geneva Conventions. (See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare which may be found here: <https://www.un.org/disarmament/wmd/bio/1925-geneva-protocol/>).

¹¹ The response of the NYPD was described and critiqued in a report generated by Human Rights Watch, which can be found online at: <https://www.hrw.org/report/2020/09/30/kettling-protesters-bronx/systemic-police-brutality-and-its-costs-united-states>.

¹² <https://www.rochesterfirst.com/daniel-prude/rochester-police-spent-nearly-1-4-million-in-overtime-costs-this-month-for-daniel-prude-protests/>.

Most use-of-force episodes arise in the context of arrests. The MCPD Office frequently represents individuals who are charged with a crime, plus additional charges of Resisting Arrest¹³ or Obstructing Governmental Administration,¹⁴ or who were alleged to be non-cooperative with officers, or had a complaint about their treatment by officers. It is not unusual for individuals to be confused about the nature of the underlying police actions. They may believe that they are free to leave and, thus, that police officers are acting improperly towards them, because no one has announced that they were being placed under arrest or informed them of the crime for which they were being arrested. These misunderstandings often lead to situations where officers resort to using force on the person in an attempt to effectuate an arrest. If arresting officers announce that an individual is being placed under arrest and announce the reason for the arrest, many misunderstandings would be avoided, and fewer occasions would arise where officers use force to effectuate an arrest.

By contrast, arrests for driving while intoxicated (“DWI”) appear to result in many fewer Resisting Arrest charges and officer uses of force than arrests for other criminal offenses, even though a DWI arrestee may be impaired and more likely to be combative and non-cooperative. This is likely due to the fact that these individuals are told why they are being investigated and given sobriety tests. If they are ultimately arrested, they know what is happening, and are much more likely to comply with officer requests, so the occasion for force diminishes. This is unlike many other police encounters, where the interaction can transform from a request for information to a full-blown arrest in very swift and unpredictable ways that the average civilian is unable to anticipate.

B. *Collect and organize use-of-force data for individual officers and the Department as a whole.*

1. Department-Wide Use-of-Force Data

All instances of officer use of force, both lethal and less than lethal, should be recorded and collected in a publicly accessible database. Such documentation should include the type of force used, any resulting physical injuries, the general location of the incident (by ward, neighborhood, precinct, etc.), and the demographics of the individuals against whom force was

¹³ New York Penal Law § 205.30. Resisting Arrest: “A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person. Resisting arrest is a class A misdemeanor.”

¹⁴ New York Penal Law § 195.05. Obstructing Governmental Administration: “A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering, whether or not physical force is involved, with radio, telephone, television or other telecommunications systems owned or operated by the state, or a county, city, town, village, fire district or emergency medical service or by means of releasing a dangerous animal under circumstances evincing the actor's intent that the animal obstruct governmental administration. Obstructing governmental administration is a class A misdemeanor.”

used, including race, ethnicity, gender, and age. Multiple police departments throughout the country already maintain such databases.¹⁵

Our clients and the a significant part of our community believe that police departments use force disproportionately against People of Color, males, young adults, and residents of certain neighborhoods. Community relations between the police departments and members of these populations will be strained as long as these beliefs persist. The first step in addressing this issue is creating and maintaining a publicly available database that can document the degree to which these disparities do or do not exist. Without such data, it will be impossible to demonstrate that a police agency's officers' decisions to employ use of force is untainted by bias. Moreover, it will be impossible to measure and demonstrate the impact of any reform on reducing disparities in the use of force. The only way to garner public trust that the police agency is addressing these issues is to obtain and publish the underlying data.

2. Officer-Specific Use-of-Force Data

Although various innocent factors can lead some officers to use force more than others, it is also true that some officers engage in the disproportionate use of force. This is likely because they use force unreasonably or have not been adequately trained on use-of-force policies. Most departments already require officers to report and document all uses of force and require supervisors to review these uses of force to ensure that they were not unreasonable or against departmental general orders. However, those reviews are incident-specific and are not designed to reveal or account for patterns in individual officer behavior.

Recording use-of-force data by officer will allow departments to identify the officers who may have a propensity to use excessive force and enable increased training and additional oversight for those officers. To the extent that disparities in the proper and improper use of force are more a reflection of “a few bad apples” than a systemic, department-wide issue, the data would be necessary to identify the “bad apples” before another tragedy occurs.¹⁶

In our experience, certain charges are regularly filed against a defendant where excessive use of force is alleged by the client or a defendant has injuries that appear to be more severe than the situation warranted. These charges include Assault in the Second Degree, Resisting Arrest, and Obstruction of Governmental Administration. With this in mind, the department should also record and examine the arrests for Assault 2nd (subdivision 3),¹⁷ Resisting Arrest, and Obstructing Governmental Administration made by each officer. Many departments already record the number of arrests department-wide for these specific offenses in annual crime statistics, so the further

¹⁵ (See, e.g., Seattle Police Department General Order Title 8, Indianapolis Metropolitan Police Department General Order 1.31).

¹⁶ Police early intervention systems are designed to flag officers with potential issues so that intervention and support may be offered. These systems often look for excessive use-of-force claims. See, e.g., *Best Practices in Early Intervention System Implementation and Use in Law Enforcement Agencies*. <https://www.policefoundation.org/publication/best-practices-in-early-intervention-system-implementation-and-use-in-law-enforcement-agencies/>; *Early Warning Systems: Responding to the Problem Police Officer*, National Institute of Justice; <https://www.ojp.gov/pdffiles1/nij/188565.pdf>.

¹⁷ New York Penal Law § 130.05(3): “With intent to prevent a peace officer, a police officer, * * * he or she causes physical injury to such peace officer, police officer * * *”

breakdown by officer should not be burdensome. (See, e.g., 2019 Irondequoit Police Department Annual Report, at 26.) This information is valuable for a number of reasons. First, the data can identify officers whose frequency of use of force may have gone unnoticed. Second, given the ambiguities and confusions possible at any arrest, it is likely that some arrests for Assault 2nd, Resisting Arrest, and Obstructing Governmental Administration result from policework that could be improved by an analysis of particular officers' actions. An officer who frequently needs to charge individuals with these offenses may be an officer who requires training in de-escalation, or other training to avoid circumstances that lead to use of force. The department's goal should be for all arrests to be accomplished without resistance or without obstruction. Any information that can contribute to that result is valuable and can avoid future instances of avoidable uses of force.

C. Explicitly prohibit certain holds or maneuvers.

Police departments should explicitly require that officers use the minimum amount of force necessary to apprehend a subject.¹⁸ It should explicitly ban certain types of police uses of force that, despite being ostensibly less-than-lethal maneuvers, involve an unnecessary risk of death.¹⁹ For instance, the New York Police Department explicitly bans its officers from performing chokeholds or strangleholds, from hog-tying, and from transporting people face down in a vehicle.²⁰ In addition, police departments should explicitly ban the use of force for purposes unrelated to safety or law enforcement. For example, the Cleveland Police Department explicitly bans the use of force on a person for talking back to an officer or as punishment for running away from an officer.²¹

D. Develop clear guidelines and training on the use of less-than-lethal force.

Many police departments in Monroe County have detailed general orders regarding when and how officers are permitted to use lethal force. But guidance for the use of less-than-lethal force is largely missing, often just a description of the vague "reasonableness" test that courts apply to

¹⁸ See Seattle Police Department General Order 8.200(1): "1. Use of Force: When Authorized: An officer shall use only the force objectively reasonable, necessary, and proportional to effectively bring an incident or person under control, while protecting the life and safety of all persons.

In other words, officers shall only use objectively reasonable force, proportional to the threat or urgency of the situation, when necessary, to achieve a law-enforcement objective. The force used must comply with federal and state law and Seattle Police Department policies, and rules for specific weapons and tools. See 8.300 - Use of Force Tools. Once it is safe to do so and the threat has ended, the force must stop."

¹⁹ See Seattle Police Department General Order 8.200(2): "2. Use of Force: When Prohibited: Officers are prohibited from using neck and carotid restraints in all circumstances."

²⁰ "Members of the New York City Police Department will NOT use chokeholds. A chokehold shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air." Patrol Guide § 203-11 (emphasis in original).

²¹ Cleveland Division of Police, Order Number 2.01.03, Procedures III, A 2: "Consistent with the principles of necessity, proportionality, objective reasonableness, and de-escalation, Officers shall not:

1. Use force to subdue a subject(s) who is not suspected of any criminal conduct, other than to protect an officer's or another person's safety.

2. Use retaliatory force (which includes, but is not limited to, force in excess of what is objectively reasonable to prevent an escape, force to punish individuals for fleeing or otherwise resisting arrest, force used to punish an individual for disrespecting officers, and other such circumstances)."

determine whether a use of force was unconstitutional. This oversight fails to recognize (a) that less-than-lethal uses of force are by far the majority of officer uses of force; (b) that the various available uses range dramatically in their potential for harm and their effectiveness; (c) that these techniques do still regularly cause injury and occasionally are lethal; and (d) that many officer uses of lethal force occur after an escalating use of less-than-lethal force.

FREEDOM OF INFORMATION LAW (FOIL) REQUESTS

In this section dedicated to FOIL requests, we focus on three specific areas. The first part lays out the current policy and procedures pertaining to FOIL requests, and what content town/village/city authorities are required to disseminate under the law. In the second section, we provide an overview of what is currently happening in town/village/city FOIL requests, and the deficient results and the inability to get certain types of information. In this second part, we provide a small case study to explain how localities respond to requests and the processes we used to address the failure to comply with FOIL requests. Lastly, after critiquing the current framework, we make suggestions to revise the FOIL process to provide a more transparent system that will foster trust between citizens and police.

Section 1: Policy and Procedural Framework of FOIL

New York State Law:

New York State's Freedom of Information Law was enacted to ensure that the public has access to the records of government not only to extend public accountability, but to allow for the State's citizenry to have a greater understanding and participation in government. Public Officers Law § 84. The statute applies broadly to any "state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state . . . except the judiciary or the state legislature," and is overseen by the New York Department of State's Committee on Open Government, whose stated purpose is to advise the government, public, and news media on, among other things, the Freedom of Information Law.²²

In its statutory framework, the New York State Legislature created a presumption of access, with limited enumerated exceptions, and the ability to withhold records that would otherwise be available except they may constitute an "unwarranted invasion of personal privacy."²³ Until June 12, 2020, Civil Rights Law § 50-a prevented the disclosure of:

[a]ll personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof. . . . Over time this narrow exception has been expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used

²² Public Officers Law § 86(3); see also About the Committee on Open Government, last accessed on January 23, 2021 at <https://www.dos.ny.gov/coog/index.html>.

²³ Public Officers Law §§ 87(2), 89(2).

to evaluate the performance of a police officer. In effect, information about officer actions and misconduct can be kept from the public in most cases. And it is.²⁴

However, on June 12, 2020, Governor Andrew Cuomo signed into law a comprehensive package which, among other things, repealed Civil Rights Law § 50-a.²⁵

Under the Freedom of Information Law, any entity that receives a request for a reasonably described record must do one of three things within five business days of receiving such a request. An agency must:

1. Make such record available to the person requesting it; or
2. Deny such request in writing; or
3. Furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of section 89 of the Public Officers Law.²⁶

Should an agency grant a request in whole or in part and then be unable to produce the requested records within twenty business days from the date of acknowledging receipt of the request, the statutory framework permits the agency to inform the requestor, in writing, of both the reason for the inability to grant the request within twenty business days and of a date certain when the request will be granted.²⁷ Failure to adhere to the aforementioned statutory timelines constitutes a denial.²⁸ Upon a denial, the requesting party may, within thirty days, appeal in writing to the head of the agency from which the records are sought.²⁹ Should the head of the agency uphold the denial of the requested records, the requesting party may seek judicial intervention and bring a proceeding for review of such a denial pursuant to Article 78 of New York's Civil Practice Law and Rules.³⁰

Section 2: Case Study

For this case study, FOIL requests were made to each police agency in Monroe County seeking, first, law enforcement disciplinary records, and, second, statistical information compiled by law enforcement agencies relating to Vehicle and Traffic Law infractions issued over a one-year period for motorists cited for window-tint violations and for operation of a motor vehicle with objects hung from the rearview mirror.

²⁴ 2014 Annual Report to the Governor and State Legislature of the State of New York Department of State Committee on Open Government at page 3, <https://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf>.

²⁵ <https://www.usnews.com/news/politics/articles/2020-06-12/new-york-gov-andrew-cuomo-signs-10-bill-police-reform-package-into-law>.

²⁶ Public Officers Law § 89 (3)(a).

²⁷ Public Officers Law § 89 (3)(a).

²⁸ Public Officers Law § 89 (4)(a).

²⁹ *Id.*

³⁰ Public Officers Law § 89 (4)(b).

a. Law Enforcement Disciplinary Records

Despite the recent repeal of Civil Rights Law § 50-a, the majority of police departments continue to deny the public access to law-enforcement disciplinary records.³¹ Upon requesting disciplinary records from various Monroe County law-enforcement agencies, our office received the following responses:

- Three agencies responded that, after review, no disciplinary records exist;
- Two agencies provided disciplinary records of law enforcement officers under their employ;
- One agency requested an extension beyond the initial 20-business-day period from the initial receipt of request to compile records, and that date has not yet passed;
- Two agencies requested an extension beyond the initial 20-business-day period from the initial receipt of request to compile records, and did not provide any records or update by that date, resulting in a constructive denial;
- Four agencies only provided a written acknowledgment of receipt of the request for records, resulting in a constructive denial;
- One agency denied the request, claiming that it was ambiguous and overbroad.

b. Statistical Information Records

In response to requests for statistical records of traffic infractions over a one-year period, our office received the following responses:

- Six agencies provided the records requested in various formats;
- Three agencies denied the requests stating that such records do not exist and the statistical information is not compiled;
 - Upon a written request for clarification, one agency provided the requested records;
 - Upon a written request for clarification, two agencies provided a written acknowledgment of receipt of the request for clarification and confirmation, but did not provide any further records or correspondence, resulting in a constructive denial;
- One agency responded that after review, no such records existed.

Section 3: Recommendations

At the outset, it is important to highlight the lack of uniformity in the methods in which records are requested from various agencies in Monroe County. Each police agency and government locality varies with respect to how to make a request and in what format the request must be made. It is our recommendation, to promote transparency in government and trust in citizens, that the FOIL request process be made more user-friendly. Specifically, an online form

³¹ <https://www.democratandchronicle.com/story/news/politics/albany/2020/12/22/new-york-state-50-a-repeal-six-months-later-police-shielding-public-records/3964062001/>.

that submits the request upon completion, similar to one the Town of Gates³² or Town of Greece³³ employs for the FOIL process, should be used. Another way to foster a healthy opinion of the police in their respective communities would be to create a category or categories of information that must be automatically disclosed to the public through an annual report or other method of disclosure. This information could include statistical reports of traffic stops, reports of police misconduct, or lists of dismissed criminal cases. The hope is that these types of automatic reporting could quash misinformation or misconceptions about the police department.

BODY-WORN CAMERAS

Body-worn cameras (BWCs) benefit both the law-enforcement agency using them and the community the agency serves. The BWC is one tool that the Rochester Police Department and other police agencies across Monroe County should use consistently in an effort to educate their officers and to hold those officers accountable for misconduct. Additionally, a BWC program builds trust with community members when they know that there is documentation of police behavior, a lack of discretion among officers as to what situations are recorded, and serious repercussions to violating BWC-use protocol. We also recommend that the Rochester Police Department and other police agencies implement dash-camera systems (or their equivalent) to expand the recording and accountability of officers and to protect the rights of those engaged in police contact.

Recording Requirements

Recommendations

The Rochester Police Department BWC Manual creates four recording requirements: mandatory, standard, optional, and prohibited. The mandatory recording requirement should be expanded. BWCs should be active at all times during officers' responses to a job call or when in contact with members of the public. The Rochester Police Department has the staff to redact BWC footage as needed. Any redacted BWC information should be documented in a memorandum/report and provided to the requestor (defense counsel or citizens through FOIL requests or, ideally, via a simpler protocol) to state the reason why the full recording was not provided. That redaction can be litigated, as needed. Timestamp values can allow for easily narrowing the footage that is recorded by an officer to only that footage that is pertinent to the needs of the requestor.

Minneapolis Police are starting a new policy requiring body cameras to be on during the entirety of every response to a call.³⁴ Minneapolis officers are also required to turn on their cameras when they began to travel to a call for service and prior to any law enforcement action. The policy specifically requires body cameras to be activated prior to "any contact with a reporting person, victim, suspect or witness." Each police agency in Monroe County should adopt a similar general order.

³² <https://www.townofgates.org/foil-request/> .

³³ <https://greece.ny.gov/freedom-of-information> .

³⁴ <https://www.cnn.com/2021/02/02/us/minneapolis-police-body-worn-camera-policy/index.html>.

Finally, each agency should conduct an annual audit to assess compliance with established policies.

Technology Issues

Recommendations

Publishing of Technical Specifications, Configurations, and Manuals. Each police department has its own BWC manuals, policies, general orders, camera models, camera technical configurations, storage systems, and disclosure processes. The details of these systems and related information are not routinely provided to the defendant in a criminal matter. All these variables and inconsistencies cause defendants to guess about technical details and fight for information that directly impacts their cases. Some BWC manuals and camera technical documentation are available online, but some information is hidden behind manufacturer website user-only areas or is otherwise unavailable.

All of the relevant information relating to BWCs should be published by police departments and publicly available. As an example, many BWCs have the ability to record with “night vision” or “enhanced low light performance,” but police departments intentionally decline to activate that feature. Defendants must be aware of exactly how the cameras have been configured to determine the value of evidence or know if something is unique to their video. An event that may be entirely visible to an officer in the field may have been recorded by a camera configured in such a way that the resulting video is of little or no value. Additionally, videos are sometimes provided with inconsistent naming or attributes, even among videos provided from the same police agency. Some videos are provided without audio for the first thirty seconds and some videos have audio that begins immediately. Sometimes videos are labeled in sequence (with files ending in 1, 2, 3, 4, etc.) and some are provided with inconsistent labeling (with files ending in 1, 2, 4, 6, etc.) seemingly skipping over clips. Some body camera videos are provided with latitude and longitude points attached, or video hardcoded with officer names, badge numbers, or other tags and metadata, and some videos are provided without these pieces of information. Without detailed and publicly available technical documentation there is no easy explanation, and defendants are left to guess what other evidence may exist, or why their evidence looks “different” from that of similarly situated defendants. Publishing all of the specifications, available options, and current settings is the only way for defendants to know what evidence exists and whether BWC policies are being followed.

Consistent Disclosure of Recording Logs and Hash Values. All body worn cameras and systems produce metadata; however, that information is inconsistently disclosed to the defendant. Different police departments, with different video cameras and different disclosure processes, make identifying non-original or altered videos nearly impossible for a defendant. Alterations are just as likely to be accidental as they are intentional, but defendants will not know anything is amiss without accompanying metadata. Often, the only log turned over with a set of video clips is an “export log” specifying what files were pulled from the police storage system. Disclosures less frequently include chain-of-custody or access logs, or logs created for the individual videos themselves. One crucial piece of information that is often missing is a “hash value.”

Generating a hash value is a digital-evidence best practice. Often referred to as a “digital fingerprint,” a hash value is a string of characters, calculated by a hash function, which uniquely identifies data. If a digital file is changed, the hash value will change. This makes comparing and identifying original files, as well as detecting possible alterations, a relatively simple math problem any computer can calculate in seconds. These hash values are often generated in any digital-evidence-system storage system and they do exist in BWC storage systems. Providing a hash value along with a video means that months or years later when a case goes to trial or is under appeal, a digital file can be definitively verified as an original and tracked from its creation. Failure to turn over this basic piece of metadata, along with other logs created with videos, may require the defendant to hire an expert to assess video authenticity when it might otherwise be accomplished by any attorney with a free and simple computer program. Hash values are quick, computationally inexpensive, and are already generated by police systems, so there is no reason they are not provided with every video.

Supplementing Body Worn Cameras with Dash Cameras

Recommendations

Body worn cameras do not capture officer observations while driving their vehicles, which is the part of a traffic stop most often relevant to the legality of a stop itself, and thus most often litigated. Adding dash cameras, particularly those that have video buffering and are activated automatically when vehicle lights or sirens are turned on, would both capture what is often a contested point in a defendant’s case and limit officer discretion. Adding dash cameras, a technology that has existed for decades, would also provide crucial additional evidence of what occurred. Police cars are increasingly being outfitted with automated license-plate-reader systems, which are a type of camera combined with artificial intelligence and image processing, which scans vehicles and their license plates as they drive past, a much more recent and sophisticated camera technology. There is no reasonable objection to the universal use of dash cameras. Automated license-plate-reader systems lead to more vehicle stops and identify more drivers with suspended licenses or other outstanding fines, but they do nothing to protect defendants’ constitutional rights.

BWC Enforcement in the Police Departments

Recommendations

There should be bright-line penalties for failing to comply with BWC procedures prescribed by Body Camera Manuals and General Orders. Police procedures in departments that employ BWCs dictate when cameras must be activated. For example, the Rochester Police Department’s BWC manual specifies “mandatory recording” events (as mentioned above) and makes clear throughout the manual that “[t]here are no exceptions to the requirement to record mandatory events.” Despite this strong language, there are no described penalties for failing to follow procedure. There must be some kind of public sanction attached to the mandatory language or the requirement has no effect. The failure to follow these mandatory procedures should not disappear into an officer’s disciplinary record never to impact the officer in pay, promotion, or continued employment.

Officer discretion is already limited in many areas of criminal law. For instance, for a sobriety checkpoint to be constitutional, it must be “maintained with a uniform procedure which afford[s] little discretion” to the officers operating the checkpoint.³⁵ Similarly, police inventory searches of vehicles must be conducted pursuant to an established procedure clearly limiting the discretion of the officer.³⁶

CONCLUSION

For decades, gradualism and quarter measures have been the hallmarks of police reform in Monroe County. We can ill afford to continue this failing tradition. The sections above are a selection of concrete proposals that would materially and immediately produce meaningful reforms in police practice in Monroe County.

As many of our proposals reflect, there is a fundamental need to collect and store data on arrests, demographics, geographics, fines, tickets, sentences, individual officers, and many other fields. The data collection must be continuous and the data public. The data produced should be searchable, not merely aggregated and placed into annual reports. Police use of force also requires unambiguous policies aimed at avoiding its excesses, minimizing its occurrence, and disciplining its abuse. Successful policies should give clarity to officers and confidence to the public.

Many additional areas deserve action, and we support the specific reform proposals by groups such as the Rochester Police Accountability Board, United Christian Leadership Ministries, Campaign Zero, and 8 Can’t Wait. Vague and aspirational proposals are inadequate to the moment. Another round of modest changes to existing policies will fail to produce necessary reforms. Fanfare followed by almost nothing will result in almost nothing except increased community cynicism. The community demands better and has waited too long for necessary reform.

³⁵ *People v. Scott*, 63 NY2d 518, 526 (1984).

³⁶ *People v. Johnson*, 1 NY3d 252, 256 (2003).